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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY COLBERT, Defendant and Appellant.	A141996 & A144633 (Sonoma County Super. Ct. No. SCR-629915)

I.

INTRODUCTION

Mark Anthony Colbert entered no contest pleas to two felony counts of commercial burglary (Pen. Code § 459),[1] and one felony count of grand theft (§ 487, subd. (a)). The trial court sentenced Colbert to a total term of eight years in state prison and ordered him to pay a restitution fine and attorney fee. In May 2014, Colbert timely appealed from the judgment.

In November 2014, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which reclassifies certain drug and theft-related offenses as misdemeanors. (*People v. Marks* (2015) 243 Cal.App.4th 331, 334.) A few months later, Colbert filed his opening brief in support of his appeal from the judgment in which he included a request that this court apply Proposition 47 to reduce one of his commercial burglary convictions to misdemeanor shoplifting. (§ 459.5.)

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Simultaneously, Colbert sought the same relief from the trial court by filing a petition for resentencing under Proposition 47. (§ 1170.18.)

The Sonoma County Superior Court "rejected" Colbert's petition on jurisdictional grounds because of his pending appeal. However, for reasons that are not clear from this record, on February 4, 2015, the trial judge who announced Colbert's original sentence, denied Colbert's petition for resentencing on its merits. Colbert timely appealed the February 2015 order.

In his first appeal from the judgment, Colbert contends that the trial court committed reversible sentencing errors by using an improper formula to calculate his restitution fine and by requiring him to pay an attorney fee.[2] We find that Colbert forfeited these claims by failing to object to the fine or fee at the sentencing hearing. In both his first and second appeal, Colbert seeks a substantive ruling from this court that Proposition 47 requires that one of Colbert's commercial burglary offenses be reclassified as a misdemeanor. We hold that Colbert may not invoke Proposition 47 for the first time on appeal from a judgment. We also find that the trial court did not have jurisdiction to rule on Colbert's resentencing petition while his appeal from the judgment was pending. Therefore, we will affirm the judgment, vacate the February 2015 order, and remand this case for further proceedings.

II.

STATEMENT OF FACTS[3]

On January 4, 2013, Colbert went into a 7-Eleven store in Petaluma and struck up a conversation with the store manager. Meanwhile, Keith Bankhead entered the store, walked along the back wall, entered a back office, and took three packs of California State Lottery tickets. After Bankhead exited the store, Colbert also left. Around 15

[2] Originally, Colbert also challenged the trial court's denial of his motion to strike his prior strike conviction pursuant to *People v. Superior Court (Romero)* (2014) 13 Cal.4th 497. However, Colbert subsequently withdrew this claim of error. Therefore, we will not address it here.

[3] Like the parties, we base our factual summary on information in the presentence report because there was no preliminary hearing or trial in this case.

minutes later, Bankhead returned to the 7-Eleven and cashed three lottery tickets from the stolen packets. That same day, Colbert and Bankhead went into a Pak'n Save store in Emeryville and cashed a stack of lottery tickets that had been stolen from the Petaluma 7-Eleven.

On February 4, 2013, Colbert and Bankhead returned to the Petaluma 7-Eleven, but this time the store manager watched both men the entire time they were in the store. Also on that day, Colbert and Bankhead went to a store at the Rotten Robbie gas station in Santa Rosa. While Colbert stayed in the store, Bankhead went into the business office and took several bundles of one-dollar bills from an open safe. Both men then left the store together.

The store manager from the Petaluma 7-Eleven positively identified Colbert and Bankhead from photographic lineups. He also reported that neither man had ever been a paying customer. The stolen lottery tickets caused the 7-Eleven to lose $1,200 and the state of California to lose $822. The money taken from Rotten Robbie totaled $375.

III.

DISCUSSION

A. Colbert Forfeited His Claims of Sentencing Error

1. *Background*

In February 2014, Colbert entered no contest pleas to three felonies: commercial burglary of the 7-Eleven (count one); grand theft of the lottery tickets from the 7-Eleven (count two); and commercial burglary of the Rotten Robbie (count three). He also admitted four prior prison term allegations (§ 667.5, subd. (b)), and one prior strike allegation (§ 1170.12). In signing an advisement of rights, waiver and plea form for the felonies, Colbert acknowledged, among other things, that he was entering an "open" plea and that he faced a maximum prison term of 12 years 8 months.

On April 29, 2014, a sentencing hearing was held before the Honorable Gary Medvigy. At that hearing, the court had before it the probation department's presentence report recommending that the Rotten Robbie burglary be treated as a separate offense from the 7-Eleven crimes; that the court impose an aggregate prison sentence of 11 years

4 months; and that Colbert be required to pay various fees and fines, including a restitution fine in the amount of $3,300. The probation department did not recommend that the court require Colbert to pay an attorney fee.

The prosecutor recommended that the court impose a shorter term than what the probation department proposed, noting that Colbert had taken some responsibility by entering pleas and that all three crimes could be characterized as part of a single criminal event. Following the prosecutor's recommendation, the court sentenced Colbert to 4 years for count one, a stayed sentence of 4 years for count two, a concurrent 4-year term for the count three burglary of the Rotten Robbie, and an additional 4 years of sentence enhancements for an aggregate term of 8 years in state prison.

The court also imposed several fines and fees, including a restitution fine pursuant to section 1202.45. Initially, the court stated the amount of the restitution fine would be $3,300, but then the following exchange occurred:

"THE COURT: . . . Actually, that should be a lesser amount. How much do you figure per year [of] prison [time] for restitution?

"PROBATION OFFICER: Base is $300. Your Honor.

"THE COURT: $300.

"PROBATION OFFICER: The base is $300.

"THE COURT: $2,400 will be that restitution fine. I'll suspend a like amount in case parole is ever revoked."

Near the end of the sentencing hearing, the court inquired whether there was any "other term or condition that I may have missed[.]" After the prosecutor and probation officer said there was not, the court inquired whether this was a "conflicts case[.]" When Colbert's counsel confirmed that it was, the court stated that Colbert would also be required to pay a $250 public defense fees.

2. *The Restitution Fine*

On appeal, Colbert contends that the trial court abused its discretion and violated constitutional prohibitions against ex post facto guarantees by using a statutory "base" fine of $300 to calculate the $2,400 restitution fine imposed under section 1202.45.

Section 1202.4, subdivision (b) (section 1202.4(b)) states:

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000). . . .

"(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

As discussed above, during the sentencing hearing the trial court had a discussion with the probation officer regarding what base amount to use to calculate the restitution fine which resulted in the court's decision to impose a $2,400 fine instead of $3,300 as recommended in the presentence report. Without acknowledging this reduction, Colbert contends that the colloquy between the court and the probation officer establishes three circumstances which mandate a further reduction of the amount of the restitution fine. According to Colbert, the interaction shows that (1) the trial court "used the formula of multiplying $300 by the years of imprisonment to reach a total of $2400"; (2) the court intended to use the statutory minimum fine as the base amount for its calculation; and (3) the probation officer's remark that the base fine was $300 was erroneous because the statutory minimum fine under section 1202.4 for Colbert's 2013 offenses was actually only $280.

Under these circumstances, Colbert argues, the trial court abused its discretion by relying on the probation officer's erroneous advice, and it also violated ex post facto

guarantees because section 1202.4(b)(1) did not provide for the application of a minimum fine of $300 until January 1, 2014.

We conclude that Colbert forfeited these claims by failing to assert them at the sentencing hearing. (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"]; *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189 ["the rule of forfeiture is applicable to ex post facto claims [citation], particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing"].)

The forfeiture rule would not apply if the alleged error resulted in an illegal sentence, i.e., one that could not have been properly imposed under any circumstance. (*People v. Scott, supra*, 9 Cal.4th at p. 354.) But in this case, the $2400 fine was not categorically prohibited by section 1202.4 because, at the time Colbert committed the subject crimes, the statutory minimum fine was $280 and the statutory maximum was $10,000. (§ 1202.4(b)(1).) "Within the range authorized by statute, the court has wide discretion in determining the amount" of the restitution fine. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 406; see also *People v. Villalobos* (2012) 54 Cal.4th 177, 186.)

Colbert attempts to avoid the forfeiture rule by arguing that his trial counsel's failure to object to the amount of the restitution fine constituted ineffective assistance of counsel. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Here, Colbert argues there is no satisfactory explanation for failing to object to the amount of the restitution fine because the record demonstrates that the trial court "was committed to calculating the entire restitution fine by adapting the statutory formula set forth in [section 1202.4] subdivision (b)(2) and multiplying the minimum base fine by the number of years of imprisonment." Therefore, Colbert posits, if defense counsel had corrected the probation officer's erroneous representation about the amount of the base fine, the court would "almost certainly" have multiplied $280 (the

proper base amount) by eight (the number of years of prison time imposed) to impose a total fine of $2240.

Colbert overlooks a satisfactory explanation for his trial counsel's decision not to object to the fine. If counsel had highlighted the fact that the probation department was recommending a base amount that was $20 higher than the statutory minimum at the time Colbert committed his offenses, she risked that either the prosecutor or the probation officer would suggest that the court apply the formula *actually recommended* in section 1202.45(b)(2), or that the court would come to that decision on its own. As reflected above, if the court had applied the formula in section 1202.45(b)(2), the fine would have been significantly higher than what was imposed. Using $280 instead of $300 as the base amount, the court would have multiplied that amount by the number of prison years (280 x 8 = 2240) and then multiplied that number again by the number of felony counts of which the defendant was convicted (2240 x 3 = 6720).

Thus, by accepting the $2400 fine without comment, Colbert's trial counsel eliminated the risk of a $6720 fine, which would have been well within the court's discretion to impose. Since this was a reasonable tactical decision, it did not deprive Colbert of his constitutional right to the effective assistance of counsel.

3. *The Attorney Fee*

Colbert contends that the $250 attorney fee must be reversed because the trial court failed to follow the statutory procedure for ordering a defendant to pay an attorney fee under section 987.8.

Section 987.8, subdivision (b) (section 987.8(b)) states: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a

county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." At a section 987.8 hearing, "the defendant is entitled to various rights, including the right to be heard in person [citation], to present witnesses and documentary evidence [citation], to confront and cross-examine adverse witnesses [citation], to disclosure of the evidence against him or her [citation], and to a written statement of the court's findings [citation.]" (*People v. Aguilar* (2015) 60 Cal.4th 862, 866 (*Aguilar*).)

On appeal, Colbert argues he was denied his procedural rights under section 987.8 because (1) he was not provided with prior notice of the attorney fee in the presentence report and (2) the trial court failed to conduct a hearing regarding Colbert's ability to pay a $250 attorney fee. However, Colbert did not raise either of these claims or otherwise object to the attorney fee at the sentencing hearing.

During the pendency of this appeal, our Supreme Court decided two cases affirming that the appellate forfeiture rule generally applies to sentencing decisions, *People v. Trujillo* (2015) 60 Cal.4th 850, 858 (*Trujillo*) and *Aguilar*, *supra*, 60 Cal.4th 862. These cases are particularly relevant here because *Trujillo*, *supra*, 60 Cal.4th 850 applied the forfeiture rule to a defendant's claims that he was deprived of procedural protections afforded by a sentencing statute, and *Aguilar*, *supra*, 60 Cal.4th 862, applied the forfeiture rule to a challenge to an attorney fee imposed under section 987.8.[4] This recent binding authority compels the conclusion that Colbert forfeited his objection to the imposition of a $250 attorney fee in this case.

Colbert attempts to distinguish his case by arguing that he was deprived of a meaningful opportunity to object to the attorney fee because he was not provided with any notice that the court intended to impose that fee. According to Colbert, such notice

[4] The *Aguilar* court declined to address "the question whether a challenge to an order for payment of the cost of the services of appointed counsel is forfeited when the failure to raise the challenge at sentencing may be attributable to a conflict of interest on trial counsel's part." (*Aguilar*, *supra*, 60 Cal.4th at p. 868, fn. 4.) No such challenge has been advanced in this case.

can be provided in the presentence report, but that did not happen here. Alternatively, Colbert concedes that "it may be possible for the defendant to receive notice at the sentencing hearing," but he argues that he did not receive adequate notice at the sentencing hearing in this case because "the court abruptly imposed the fees at the close of the proceedings."

Colbert confuses the issue by conflating his procedural right to notice of the attorney fee with his obligation to assert a procedural right in order to preserve the matter for later review. Colbert had the opportunity to object to the attorney fee (whether for lack of prior notice or for any other reason) at the sentencing hearing *when* the court announced its intention to impose that fee. (*Aguilar*, *supra*, 60 Cal.4th at pp. 867-868.) By failing to avail himself of the opportunity to object, Colbert forfeited his right to raise these issues on appeal. (*Ibid*.) Furthermore, Colbert's assertion that the attorney fee was "abruptly imposed" is conjecture. Nothing in this record suggests that Colbert's trial counsel was cut-off or otherwise prevented from objecting to the attorney fee. The hearing transcript does not indicate that the trial court said or did anything at the end of the hearing to foreclosure further discussion of the attorney fee or of any other sentencing issue. By itself, the fact that the attorney fee was the last subject discussed at the hearing does not support Colbert's contention that he was denied a meaningful opportunity to object to it.

In his reply brief, Colbert advances a new argument that imposing an attorney fee under these circumstances violates due process. "It is axiomatic that arguments made for the first time in a reply brief will not be entertained . . . ." (*People v. Tully* (2012) 54 Cal.4th 952, 1075.) Furthermore, in *Trujillo*, *supra*, 60 Cal.4th at p. 859, the Supreme Court found that no "core autonomy interests or constitutional rights are implicated by the waiver of a judicial hearing on a defendant's ability to pay[.]" Colbert fails to address this point, or to provide any analysis or authority supporting his due process claim.

For all these reasons, we hold that Colbert forfeited his challenges to the restitution fine imposed under section 1202.45 and the attorney fee imposed under section 987.8.

B. Colbert's *Proposition 47 Arguments Are Not Properly Raised Here*

1. *Pertinent Provisions of Proposition 47*

"The voters approved Proposition 47 at the November 4, 2014 General Election, and it became effective the next day. Its declared purpose is 'to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated . . . into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment' while at the same time 'ensur[ing] that sentences for people convicted of dangerous crimes . . . are not changed.' [Citation.]" (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).

To accomplish this purpose, "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108)

The theft-related offense at issue in this case is burglary. (§ 459.) "Proposition 47 created a new crime of 'shoplifting,' a misdemeanor offense that punishes certain conduct that previously would have qualified as a burglary." *(In re J.L.* (2015) 242 Cal.App.4th 1108, 1112.) That new crime is now codified in section 459.5, which states, in pertinent part: "Notwithstanding section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor . . . . [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

" 'Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person "currently serving" a felony sentence for an offense that

is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)' [Citation.]" (*People v. Contreras* (2015) 237 Cal.App.4th 868, 891 (*Contreras*).)

2. *Procedural Background*

On January 12, 2015, Colbert filed an opening brief in his appeal from the judgment in which he requested that this court reclassify his section 459 felony conviction for commercial burglary of the Rotten Robbie as misdemeanor shoplifting under section 459.5. A few weeks later, on January 21, Colbert filed a petition under section 1170.18, seeking the same relief from the trial court. Although Colbert's section 1170.18 petition stated that he was acting in pro. per., the attached declaration of service indicates he secured assistance from the First District Appellate Project (FDAP).

On January 21, 2015, the same day Colbert's petition was filed, the presiding judge of the Sonoma County Superior Court, the Honorable Kenneth Gnoss, sent a letter to the FDAP attorney who represented Colbert. Judge Gnoss acknowledged receipt of Colbert's petition, but he also observed that court records showed Colbert's case was currently on appeal. The court then stated that the Proposition 47 resentencing process cannot be utilized while a case is on appeal and the superior court does not have jurisdiction of the cause. The court opined that even if the two year filing period for bringing a section 1170.18 petition were to expire, the pendency of the appellate proceedings would be good cause for filing a late petition. To support its conclusions, the court cited *People v. Flores* (2003) 30 Cal.4th 1059, 1064 and *People v. Yearwood* (2013) 213 Cal.App.4th 161 (*Yearwood*). In closing, Judge Gnoss stated: "We therefore reject this petition until the appeal has been cleared on this case."

Notwithstanding Judge Gnoss's letter, on February 3, 2105, the People formally opposed Colbert's section 1170.18 petition by filing a Judicial Council form entitled

"Minutes, Response, and Order On Petition For Resentencing (PC 1170.18)." On the part of the form that was to be filled out by the prosecuting agency, the People took the position that Colbert was not eligible for relief under section 1170.18, for the following reasons, which were handwritten on the form: "CT I 459 and CT II 487(a) both relate to theft of over $950.00 worth of lottery tickets. CT III 459 involves theft of cash from safe in employee office, not a commercial portion of the store, nor items taken for sale."

On February 4, 2015, Colbert's petition appeared as a pending matter on Judge Medvigy's docket. Defense attorney Marie Case, who represented Colbert at the sentencing hearing, was present in the courtroom. When the trial court inquired about Colbert's petition, Ms. Case replied "You're right, Your Honor. He, apparently, from State Prison, filed a motion." Case clarified that she did not participate in the preparation of the petition and opined that Colbert had done it himself. After the court advised Ms. Case that the People opposed Colbert's petition on the ground that he did not qualify for re-sentencing because of the "amounts involved," she agreed to submit the matter without a hearing. Then, the court made the following ruling:

"On the pleadings, the Court is going to deny the petition. I don't find that the offenses he's seeking to reduce qualify under Prop. 47 for the reasons stated in the People's pleadings. Not only the amount being well over $950, but I don't believe Prop. 47 applies to safes in the back in the otherwise commercial building. ¶. . . ¶ It's not a retail theft by any stretch. . . ."

3. *Colbert's Request That This Court Reclassify His Crime Is Improper*

In his first appeal, Colbert requests that this court reclassify his felony conviction for commercial burglary of the Rotten Robbie to a misdemeanor, either directly or pursuant to a remand with instructions. Colbert argues that the Rotten Robbie offense falls squarely within section 459.5 because only $375 was taken and the offense was committed while the store was open and shop employees were present. Colbert further contends that Proposition 47 applies retroactively under the rule established by our Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740, 748, which provides that a

mitigating penal amendment applies retroactively unless the Legislature or the electorate explicitly provided that the new provision applies only prospectively.

The pertinent question is not whether the mitigated punishment afforded by Proposition 47 applies retroactively to qualified applicants. The question here is whether the statutory sentence reductions authorized by the new law apply automatically to cases on appeal. "[T]he plain language of Proposition 47 and the extrinsic evidence surrounding its passage demonstrate that neither persons currently serving a sentence for a listed offense, nor those who have completed such a sentence, are automatically entitled to reduction in punishment." (*Diaz*, *supra*, 238 Cal.App.4th at p. 1336.) "Rather, the voters set forth specific procedures for securing the lesser punishment to eligible persons such as defendant. These are the sole remedies available under Proposition 47 for an accused sentenced prior to its effective date." (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 313 (*Shabazz*).)

Here, Colbert's sole remedy under Proposition 47 requires him to file a section 1170.18 petition in the court of conviction, not to seek a reduction of his conviction in the first instance on appeal. (*Diaz*, *supra*, 238 Cal.App.4th at pp. 1331-1332 ["the plain language of section 1170.18 . . . demonstrates that both for persons who are currently serving a sentence for a felony reduced by Proposition 47, and for those who have completed such a sentence, the remedy lies in the first instance by filing a petition to recall (if currently serving the sentence) or an application to redesignate (if the sentence is completed) in the superior court of conviction."]; *Shabazz*, *supra*, 237 Cal.App.4th at p. 314 ["Defendant is limited to the statutory remedy" and "must file an application in the trial court to have his felony convictions designated [as] misdemeanors."]; *People v. Contreras*, *supra*, 237 Cal.App.4th at pp. 891-892 ["In essence, defendant asks this court to designate his offenses as misdemeanors under section 1170.18 in the first instance, rather than review the trial court's ruling on his petitions to recall his sentence. That is not our role."].)

4. *The Trial Court Lacked Jurisdiction To Decide Colbert's Petition*

In his second appeal, Colbert argues the February 2015 order must be reversed for three independent reasons. First, the trial court adopted a legally erroneous interpretation of the statutory term "commercial establishment" in section 459.5. Second, the court erroneously considered evidence in the probation report rather than looking solely at the record of Colbert's conviction.[5] Finally, Colbert argues, Judge Medvigy erred by addressing the merits of the petition after Judge Gnoss ruled that the court did not have jurisdiction over the cause.

The People disagree with Colbert's "expansive" interpretation of section 459.5, arguing that the felony burglary of the Rotten Robbie should not be construed as misdemeanor shoplifting because the stolen property was cash rather than merchandize and because the money was stolen from a part of the commercial establishment that was not open to the public. The People also argue that the presentence report may be considered when ruling on a section 1170.18 petition. However, they concede that the trial court did not have jurisdiction to rule on the merits of Colbert's petition during the pendency of his appeal.

"Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun. [Citation.] And, '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [Citations.] This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. [Citations.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial

[5] Colbert attempts to reconcile this argument with the fact that in his first appeal, he relied on evidence in the probation report to support his request that this court reduce his count three conviction to misdemeanor shoplifting. According to Colbert, different evidence may be considered by an appellate court when ruling on a Proposition 47 request than by a trial court when ruling on a section 1170.18 petition.

court while the appeal is pending is null and void. [Citation.]" (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923 (*Scarbrough*).)

In *Scarbrough*, *supra*, 240 Cal.App.4th 916, the defendant pleaded no contest to drug related offenses and felony child endangerment. While her appeal from the judgment was pending, she obtained an order from the trial court pursuant section 1170.18 "ostensibly recalling her sentence" for two of her felony convictions and "designating those convictions as misdemeanors and resentencing her." (*Id*. at p. 920.) The *Scarbrough* court concluded that "the trial court lacked jurisdiction to resentence defendant." (*Ibid*.) Thus, the appellate court found that the order ostensibly recalling defendant's sentence and resentencing her was void. (*Ibid*.) In reaching this conclusion, the court applied the settled law summarized above; found that the limited exceptions to jurisdictional divestment do not apply to a section 1170.18 petition; and analogized this statute to section 1170.126 of the Three Strikes law, which has also been found not to apply to those whose judgments are not yet final. (*Id*. at pp. 924-925; see *Yearwood*, *supra*, 213 Cal.App.4th at p. 177.)

We agree with *Scarbrough* and adopt its analysis here. Accordingly, we conclude that the February 2015 order is void because the trial court was divested of jurisdiction to rule on Colbert's section 1170.18 petition while his appeal from the judgment was pending in this court. In light of this conclusion, we need not and do not address the numerous other issues the parties advance regarding how Proposition 47 should be applied in this case.

III.

DISPOSITION

The judgment is affirmed. The February 14, 2015 order is vacated and this case is remanded to the trial court for further proceedings consistent with this decision.

_____
RUVOLO, P. J.

We concur:

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RIVERA, J.

_____
STREETER. J.